Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of Policy and Rules Concerning the Interstate Interexchange Marketplace Implementation of Section 254(g) of the Communications Act of 1934, as Amended	CC Docket No. 96-61

Opposition of the State of Hawaii

The State of Hawaii[1] hereby opposes the petition for reconsideration of the Commission's December 31, 1998 Order filed by Nextel Communications in the above-captioned proceeding.[2] In the Order, the Commission – once again – affirmed that the rate integration requirements of Section 254(g) of the Communications Act apply to all providers of interstate, interexchange services, including Commercial Mobile Radio Service ("CMRS") providers.[3] In its petition, Nextel claims that the Commission's interpretation of Section 254(g) is

[1] The State submits this opposition acting through its Department of Commerce and Consumer Affairs.

[2] *See Petition for Reconsideration of Nextel Communications, Inc.* (filed March 4, 1999) *("Nextel Petition").* Rand McNally & Company also filed a petition for reconsideration. Because this petition is limited to copyright issues, the State has not addressed it.

[3] *See Policy and Rules Concerning the Interstate, Interexchange Marketplace -- Implementation of Section 254(g) of the Communications Act of 1934, as Amended,* FCC 98-347, CC Docket No. 96-61 (rel. Dec. 31, 1998) ("*CMRS Order*"). The Commission also denied several petitions seeking forbearance from Section 254(g)'s rate integration

inappropriate as a matter of law and inconsistent with the Commission's deregulatory policies for CMRS. Nextel also asserts that the Commission's decision to use MTAs as the dividing line between local and interexchange calls in the CMRS context is "unworkable."

As demonstrated below, Nextel's claims find no support in either the statute or its legislative history. To the contrary, as the Commission has repeatedly determined, the plain language of Section 254(g) makes clear that rate integration applies to CMRS providers. Moreover, experience has demonstrated, and Congress has recognized, that rate integration is entirely consistent with the workings of a competitive market. In accordance with Section 254(g)'s plain language and the agency's prior determinations, the Commission must reject Nextel's claim that the statutory rate integration requirement does not apply to CMRS. While the State is skeptical of Nextel's broad claim that the use of MTAs to identify interexchange calls is "unworkable," it is not unalterably opposed to the possibility of granting some flexibility to CMRS providers that can clearly demonstrate they would suffer irreparable harm from the MTA approach.

I. SECTION 254(g)'s RATE INTEGRATION REQUIREMENTS UNANMBIGUOUSLY APPLY TO CMRS PROVIDERS

In its petition, Nextel observes that the Commission has found that Section 254(g) "unambiguously" applies to all providers of interstate, interexchange services, including CMRS providers.[4] The carrier further observes that the Commission has found this provision to be

requirements for CMRS providers. Notably, Nextel does not challenge the Commission's finding that such forbearance would be inappropriate. *Id.* at ¶ 29.

[4] *Nextel Petition* at 2.

"ambiguous" for the purpose of applying rate integration to affiliated companies.[5] In light of these two readings of the statute, Nextel – relying on the Supreme Court's decision in *Chevron* – argues that the Commission must ignore the plain language of Section 254(g) and, instead, "look to other sources" to determine the statute's intended meaning.[6]

Nextel's reliance on *Chevron* is misplaced. In *Chevron*, the Court made clear that an agency must only look beyond the plain language of a statute where it is "ambiguous with respect to the *specific issue*" before the agency.[7] Here, Nextel has confused two *separate issues*. To be sure, the Commission has noted that Section 254(g) does not provide "explicit guidance" for the limited purpose of applying rate integration to affiliated companies.[8] This, however, does not mean "Section 254(g) must be read as ambiguous" for all other purposes.[9] Such an approach to statutory interpretation would be directly at odds with the Court's command in *Chevron* that an agency "must give effect to the unambiguously expressed intent of Congress."[10]

By its terms, Section 254(g) of the Communications Act states that "a provider of interstate interexchange services shall provide such services to its subscribers at rates no higher than the rates charged to its subscribers in any other State."[11] Consistent with the broad sweep of

---

[5] *Id.* at 3.

[6] *Id.*

[7] *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984) (emphasis added).

[8] *See Policy and Rules Concerning the Interstate, Interexchange Marketplace -- Implementation of Section 254(g) of the Communications Act of 1934, as Amended,* 12 FCC Rcd 11812, 11819 (1997).

[9] *Nextel Petition* at 4.

[10] *Chevron*, 467 U.S. at 843.

[11] 47 U.S.C. § 254(g).

this provision, the Commission has found that "on its face Section 254(g) *unambiguously* applies to all providers of interstate, interexchange services."[12] Thus, there is no statutory ambiguity on the "specific issue" that is the subject's of Nextel's petition.

Nextel finds it significant that Congress did not choose to "provide a definition of the term 'provider of interstate, interexchange services'" in the Telecommunications Act of 1996.[13] The State also finds the legislature's silence to be significant. As the Commission has recognized, had Congress intended to exempt CMRS providers from the requirements of Section 254(g), it would have done so expressly just as it did with respect to many other provisions of the 1996 Act.[14] Congress, however, chose not to do so. The Commission therefore should – once again – affirm that the statutory rate integration requirement applies to *all* providers of interexchange services "with no exceptions."[15]

---

[12] *CMRS Order* at ¶ 10 (emphasis added).

[13] *Nextel Petition* at 3.

[14] *See CMRS Order* at ¶ 10. For example, the 1996 Act expressly: excludes CMRS from the definition of local exchange carrier; classified CMRS as one of the "incidental interLATA services that the Bell companies could offer without prior Commission approval; excluded CMRS from the definition of "basic telephone service", thereby permitting the BOCs to offer electronic publishing over their CMRS networks; permitted the BOCs to market and sell CMRS in conjunction with other services. *See* 47 U.S.C. §§ 153(26), 271(g)(3), 274(i)(2)(B).

[15] *Policy and Rules Concerning the Interstate, Interexchange Marketplace -- Implementation of Section 254(g) of the Communications Act of 1934, as Amended*, CC Docket No. 96-61, FCC 97-357, at ¶ 19 (rel. Oct. 3, 1997) ("*Stay Order*"); *see Policy and Rules Concerning the Interstate, Interexchange Marketplace -- Implementation of Section 254(g) of the Communications Act of 1934, as Amended*, 11 FCC Rcd 9564, 9589 (1996) ("*First Report and Order*"); *Policy and Rules Concerning the Interstate, Interexchange Marketplace -- Implementation of Section 254(g) of the Communications Act of 1934, as Amended*, 12 FCC Rcd 11812, 11821 (rel. July 30, 1997) ("*Reconsideration Order*").

II. SECTION 254(g) EXPANDED THE COMMISSION'S RATE INTEGRATION AND RATE AVERAGING POLICIES

The petitioner next asserts that the legislative history accompanying the Telecommunications Act of 1996 demonstrates Congress' "*express* intention to codify . . . the Commission's existing rate integration policies for landline interexchange carriers."[16] Based on this reading, Nextel further asserts that the legislature did not intend Section 254(g) to apply to CMRS providers.

Nextel's claims find no support in Section 254(g)'s legislative history. Much as Nextel might wish it were otherwise, the word "codify" does not appear in the portion of the Conference Report accompanying Section 254(g).[17] Nor, as the Commission has recognized, is there any other language in the legislative history indicating that Congress intended to limit the application of Section 254(g) to wireline carriers. [18]

More important, Nextel's limited reading of the legislative history is inconsistent with the broad scope of the statutory rate integration provision. Section 254(g) not only incorporated the Commission's existing rate integration and rate averaging policies, but it also significantly expanded these policies as part of a larger commitment to advance universal service. In this regard, the Commission has determined that the Telecommunications Act of 1996 extended

---

[16] *Nextel Petition* at 5 (emphasis in original). Like many of the arguments raised by Nextel, this claim has been thoroughly considered and flatly rejected by the Commission. *See CMRS Order* at ¶¶ 9-11.

[17] Elsewhere in the legislative history of the Telecommunications Act of 1996, Congress used this term to express its clear intent. *See* H.R. Conf. Rep. No. 104-458, 104th Cong., 1st Sess. 188 (1996).

[18] *See CMRS Order* at ¶ 11. Nextel attempts to explain away this absence by suggesting – without citing any precedent – that CMRS providers were not subject to rate integration prior to 1996. This is not correct. While the Commission did not pass on violations of this policy by CMRS providers, these wireless providers of interstate, interexchange services were subject to Section 202(a) of the Communications Act and the Commission's related rate integration policy.

the Commission's policy of rate averaging, which previously applied to AT&T, to all providers of interstate interexchange services and to intrastate interexchange services.[19] Similarly, the Commission has determined that Section 254(g) "*extends* rate integration to U.S. territories and possessions" in the Western Pacific.[20] Nextel's basic argument – that "Congress, by its own words, did not expand the scope of the Commission's rate integration policy *in any way*" – cannot be reconciled with the plain language of the Act and, therefore, must fail.[21]

The Commission also should reject Nextel's claim that CMRS providers should not be subject to rate integration because they "typically resell landline interexchange carrier service to complete mobile-originated calls to offshore domestic points."[22] As the Commission has recognized, the statute provides no basis for distinguishing between resellers and facilities-based service providers.[23] Moreover, the suggestion that a CMRS interexchange reseller's "underlying cost is already established" does not provide any protection from discrimination against offshore points.[24] Without rate integration, such CMRS resellers, "when consistent with their economic interests, could discriminate against offshore points" in just the same manner as facilities-based providers. Nextel has failed to describe how abandoning Section 254(g)'s rate integration

---

[19] *See First Report and Order,* 11 FCC Rcd at 9568, 9585.

[20] *Id.* at 9589 (emphasis added).

[21] *Nextel Petition* at 5 (emphasis added).

[22] *Id.* at *6.*

[23] *See Reconsideration Order,* 12 FCC Rcd at 11822.

[24] *Nextel Petition* at 6.

requirements – and, in effect, granting CMRS providers a license to adopt discriminatory rate structures – would advance consumer protection.

III. RATE INTEGRATION IS CONSISTENT WITH THE COMMISSION'S PRO-COMPEITIVE POLICIES FOR CMRS

In its petition, Nextel asserts that rate integration is "inconsistent" with the Commission's deregulatory policies in favor "CMRS service and price competition."[25] This, however, is not the case. CMRS rates have long been subject to the requirements of Title II of the Communications Act. Indeed, Section 332(c) of the Act expressly *requires* the Commission to regulate CMRS providers pursuant to Sections 201 (just and reasonable rates, interconnection obligations), 202 (unreasonable rate discrimination prohibited), and 208 (enforcement of violations through the complaint process) of the Communications Act.[26] Section 254(g) shares with Sections 201 and 202 the common goal of ensuring that consumers do not pay unreasonably high or discriminatory rates.

Experience, moreover, has demonstrated that rate integration is entirely consistent with the workings of a competitive market. For years, wireline carriers have been required to integrate the rates for their interstate, interexchange services and the policy has not impeded the trend towards competition in that market. By 1996, this market was sufficiently competitive that the Commission declared AT&T to be non-dominant. Nonetheless, Congress has determined that, even in competitive markets, there is an ongoing need to ensure that "the benefits of

---

[25] *Id.* at 6.

[26] *See* 47 U.S.C. § 332(c).

growing competition for interstate, interexchange telecommunications services . . . are available throughout our nation."[27]

Like Nextel, the State views the growth of competition in the CMRS industry as a positive development.[28] However, only a handful of truly integrated, wide-area *digital* calling plans that use the same rate structure for *all* interstate, interexchange calls have been introduced.[29] Thus, notwithstanding Nextel's claims that "CMRS carriers are pushing the envelope and blurring distinctions between local and toll calling",[30] the fact remains that the many mobile customers do not – and likely will not for the foreseeable future – take service under flat-rate plans.[31] Congress enacted Section 254(g) precisely to ensure that these consumers would also realize the benefits of rate integration.[32]

---

[27] *First Report & Order*, 11 FCC Rcd at 9583; *see id.* at 9588.

[28] *Nextel Petition* at 7. To the extent that Nextel has raised questions concerning the treatment of wide area calling plans, the Commission has suggested that it will issue a further *Notice* on this subject. *See CMRS Order* at ¶ 25.

[29] Moreover, the Commission has determined that the development of competition in the CMRS industry is "still in its early stages" and that "there is ample room for improvement." *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, FCC 98-91 (rel. June 11, 1998).

[30] *Nextel Petition* at 7.

[31] As the Commission has recognized, "CMRS providers' few cited anecdotal instances of the offering of rates that comply with the rate integration requirement of Section 254(g) do not ensure that such rates will be offered in the future." *CMRS Order* at ¶ 29.

[32] Nextel suggests that CMRS providers may seek to avoid rate integration by raising local rates "to subsidize integrated long distance rates." *Nextel Petition* at 7. If the CMRS market were as competitive as Nextel suggests, such pricing practices would not be a concern. However, to ensure that no carriers attempt to engage in such a scheme, the Commission should make clear that it would not tolerate such anticompetitive pricing practices.

IV. THE COMMISSION SHOULD CONTINUE TO USE MTAs TO DISTINGUISH LOCAL AND INTEREXCHANGE CMRS CALLS

Finally, Nextel asserts that the Commission's decision to use MTAs to identify interexchange CMRS calls is "unworkable."[33] While the State did not oppose the MTA approach, it did suggest that the CMRS providers should be more forthcoming in providing "information on the technical aspects of their networks" that would be useful in drawing a boundary between local and interexchange calls in the CMRS context.[34] Such information was not provided. Not surprisingly, Nextel now claims that the approach adopted by the Commission "fails to account for the unique licensing and operational requirements of various subsets of CMRS carriers." [35]

The State is skeptical of Nextel's broad claim that the MTA approach is unworkable. To begin with, Nextel has provided little information about the exact nature and specific scope of the problem it complains of. Moreover, Nextel is alone before the agency in asserting that the MTA approach – which has been used successfully for purposes of reciprocal compensation – is unworkable. This suggests that many members of the CMRS industry find the MTA approach to be workable.[36]

Notwithstanding these reservations, the State is not unalterably opposed to the possibility of granting some flexibility to CMRS providers. The Commission, however, should not

---

[33] *Nextel Comments* at 8.

[34] *Opposition of the State of Hawaii*, CC Docket No. 96-61, at 23.

[35] *Nextel Comments* at 8. The State initially expressed some reservations concerning the MTA approach. *See Opposition of the State of Hawaii*, CC Docket No. 96-61, at 23 (filed Oct. 31, 1997). However, in an effort to reach a compromise with the CMRS industry, the State did not ultimately oppose the adoption of MTAs as the dividing line between local and interexchange calls in the CMRS context.

[36] Indeed, some members of the CMRS industry have suggested to the State that MTAs be used to distinguish between local and interexchange CMRS calls.

simply allow CMRS providers to "adopt their own local calling areas", as suggested by Nextel.[37] Rather, the agency should consider whether flexibility would be warranted for a CMRS provider that could demonstrate that it would suffer irreparable harm as a result of the MTA approach.

CONCLUSION

For the foregoing reasons, the Commission should reject Nextel's request to reconsider the Order. Instead, the Commission should once again confirm that the rate integration requirements of Section 254(g) apply to CMRS providers.

Respectfully submitted,

THE STATE OF HAWAII

By: Brian McHugh

Herbert E. Marks
Brian J. McHugh
Squire, Sanders & Dempsey L.L.P.
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044
(202) 626-6624

Its Attorneys

April 16, 1999

---

[37] *Nextel Petition* at 10.

CERTIFICATE OF SERVICE

I, Brian J. McHugh, hereby certify that a true and correct copy of the foregoing Opposition of the State of Hawaii was served by hand delivery or first-class mail, postage prepaid, this 16th day of April 1999, on:

Robert S. Foosaner
Lawrence R. Krevor
Laura L. Holloway
Nextel Communications, Inc.
1450 G Street, N.W.
Washington, D.C. 20005

Leonard J. Kennedy
Laura H. Phillips
Laura S. Roecklein
Dow, Lohnes & Albertson
1200 New Hampshire Ave., N.W.
Suite 800
Washington, D.C. 20036

Daniel S. Goldberg
Goldberg, Godles, Wiener & Wright
1229 Nineteenth Street, N.W.
Washington, D.C. 20036

Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 Twelfth St., S.W.
Room TW-A325
Washington, D.C. 20554

ITS
1231 20th Street, N.W.
Washington, D.C. 20036

April 16, 1999

Brian J. McHugh